

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

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FILE: B-185954

DATE: June 10, 1976

MATTER OF: Capay Painting Corporation

98848

DIGEST:

1. Where low bidder did not calculate and include in bid price transportation costs, failure was not apparent clerical mistake under ASPR § 2-406.2, since bid price was submitted in lump sum and nature of possible mistake could not be ascertained from bid.
2. Clear and convincing evidence of intended bid price does not exist where bidder did not intend to include transportation costs in bid submitted and where more than one price for costs could have been included in bid.

Invitation for bids No. F65501-76-0-9021 was issued at Elmendorf Air Force Base for the repair of hanger roofs. The Capay Painting Corporation (Capay) submitted the low bid of \$146,000. The next low bid was \$260,000. The high bid was \$497,600. Due to the extreme lowness of the Capay bid, the bidder was requested to verify the price. The president of Capay stated that due to errors in the bid withdrawal of the bid might be necessary. Documentation proving the error was requested of Capay. Documentation was thereafter furnished with the request that correction of the bid in the sum of \$43,410 (initially claimed as \$40,000) be permitted to allow for the costs of transporting materials between Anchorage, Alaska, and the job site at Galena Air Force Base, these costs not having been included in the bid price. The contracting officer determined that while it was obvious that an error had been made there was no clear and convincing evidence as to the bid price that was actually intended. The administrative determination of the Staff Judge Advocate concurred. Consequently, award was made to the second low bidder.

It is, first, the position of Capay that the obvious failure to include transportation costs in the bid is correctable under paragraph 2-406.2 of the Armed Services Procurement Regulation (ASPR) (1975 ed.), which permits correction of apparent clerical mistakes and which sets forth, by way of example, "* * * obvious reversal of the price f.o.b. destination and the price f.o.b.

factory * * *," contended to be analogous to the immediate situation. Second, it is noted that, inasmuch as it is admitted by all parties that the existence of a mistake is apparent, the only issue for consideration is whether clear and convincing evidence of the bid actually intended by Capay exists as required by ASPR § 2-406.3(a)(3) (1975 ed.). In this respect it is contended that since air transport is the only means of transportation between Anchorage and Galena (the Capay working papers show the price of materials used were f.o.b. Anchorage) and since only one airline flies that route it is possible to determine from the published rate schedules what the cost of such transportation was at the time of bid submission. Capay requested advice regarding the cost to transport approximately 100,000 pounds of cargo (the weight, Capay notes, is ascertainable from the invitation requirements) from a travel service in New York and was advised that the cost would be \$43,410. The Capay bid would still be low after the addition of this cost increase. It is finally stated that "clear and convincing evidence" has been frequently defined to mean that no serious or substantial doubt exists as to the correctness of the conclusion to which the evidence leads. That evidence should be clear--that is not ambiguous, doubtful, equivocal, or contradictory--and should be pointed to the issue under investigation. It must be "convincing" in the sense that the source from which it comes is of such a credible nature that men of ordinary intelligence, discretion, and caution may repose confidence in it, but absolute certainty is not a requirement of clear and convincing evidence. Hobson v. Eaton, 399 F.2d 781 (6th Cir. 1968). Regarding the use of the published rates, it is stated that our Office has recognized the validity of a contracting officer evaluating circumstances beyond those clearly indicated in a bidder's documentation to determine whether a mistake was made and, if so, the nature of that mistake. S. J. Groves & Sons Company, B-184260, March 30, 1976, 76-1 CPD 205.

As regards the contention that the error involved in this case is an apparent clerical mistake, we disagree. ASPR § 2-406.2 states that such an error is one that is apparent on the face of the bid itself. Inasmuch as the bid required nothing more than one lump-sum price to be submitted, the exact error, if any, could not be determined (and was not apparent) from the bid.

We do, however, agree that the existence of a mistake was established and that the sole issue to be resolved is whether clear and convincing evidence of the bid actually intended by Capay exists.

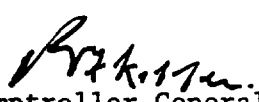
But we do not believe that the requisite clear and convincing evidence of the intended bid does exist. First, Capay made no calculations regarding transportation costs in determining its bid price, and thus, strictly speaking, it did not intend to submit a bid including any transportation costs. Graybar Electric Company, Inc., B-186004, April 6, 1976, 76-1 CPD 228. In that connection, the claim for the \$43,410 correction is based upon a quotation Capay obtained more than a month after the bid opening. Thus Capay is not seeking to have the bid corrected to include a previously calculated item which was inadvertently omitted from the amount of the original bid. As was stated in 37 Comp. Gen. 650, 652 (1958):

"* * * The basic rule is, of course, that bids may not be changed after they are opened, and the exception permitting a bid to be corrected upon sufficient facts establishing that a bidder actually intended to bid an amount other than set down on the bid form, where the contracting officer is on notice of the error prior to acceptance, does not extend to permitting a bidder to recalculate and change his bid to include factors which he did not have in mind when his bid was submitted, or as to which he has since changed his mind. To permit this would reduce to a mockery the procedure of competitive bidding required by law in the letting of public contracts. See 17 Comp. Gen. 575, 577."

Second, the contracting officer inquired of local air carriers as to the freight rates from Anchorage to Galena and was told that the rate was \$11.30 per CWT. Consequently, the contracting officer has stated that using the 100,000-pound quantity used by Capay in determining the amount of its mistake, the transportation cost would be \$11,300 plus 5-percent tax. Further, the contracting officer has indicated that Galena is accessible by barge during certain times of the year. Thus, it cannot be said with certainty what price Capay would have used in computing the transportation costs to be included in its bid had it properly calculated those costs.

Accordingly, since we agree that the decision not to permit the correction requested by Capay is reasonable, the protest is denied.

Deputy


Comptroller General
of the United States